BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2019-224-E
DOCKET NO. 2019-225-E

In the Matter of:	)	
	)	
South Carolina Energy Freedom Act (House Bill 3659) Proceeding Related to S.C. Code Ann. Section 58-37-40 and Integrated Resource Plans for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC	)	**DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S RENEWED MOTION TO STRIKE**

Pursuant to S.C. Code Ann. Regs. 103-829(A) and 103-846 and South Carolina Rule of Evidence ("SCRE") 103, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively the "Companies") renew their Motion to Strike filed April 19, 2021 ("Motion to Strike") and hereby move the Public Service Commission of South Carolina ("Commission") for an order striking the pre-filed surrebuttal testimony, related hearing testimony, and exhibits as outlined in the Motion to Strike and as supplemented in this motion.[1] The Companies' Motion to Strike was argued and denied by the Chairman at the beginning of the merits hearing but the ruling expressly allowed for a renewal of the motion. See Tr. Vol. I, p. 22, ll. 1-4.

DEC and DEP now renew their motion to strike the following materials:

(1) Surrebuttal Testimony of Rachel Wilson, witness for Natural Resources Defense Council, Sierra Club, Southern Alliance for Clean Energy, South Carolina Coastal Conservation League, and Upstate Forever (together, the "Environmental Parties") and Carolina Clean Energy Business Association[2] ("CCEBA" and together with the Environmental Parties, the "Clean Energy Intervenors");

[1] The Companies incorporate by reference the arguments made in their Motion to Strike filed on April 19, 2021.
[2] On March 10, 2021, the Commission granted SCSBA's motion to be renamed in these and other dockets as Carolinas Clean Energy Business Association ("CCEBA"). For consistency with previously filed documents, this brief will refer to SCSBA as CCEBA.

(a) All pre-filed and live testimony (Tr. Vol. 7, pp. 2144 - 2294);

(b) Exhibit RSW-1 (Hearing Ex. 56) (Summary of Professional Experience); and

(c) Exhibit RSW-2 (Hearing Ex. 56) (Synapse Proposed Alternative Resource Plan, Corrected Version dated March 19, 2021) ("Synapse Alternative Plan").

(2) Surrebuttal Testimony of Kevin Lucas, witness for CCEBA;

(a) Pre-filed testimony Page 2, line 17 through page 3, line 2 (Tr. Vol. 7, pp. 1911.5-1911.6 (introducing Synapse Alternative Plan and relying on its findings and conclusions);

(b) Pre-filed testimony Page 14, line 2 through page 21, line 12 (Tr. Vol. 7, pp. 1911.17 – 1911.24) (Section III, in its entirety, discussing Synapse Alternative Plan and advocating Commission rely on its analysis, findings and conclusions);

(c) Pre-filed testimony Page 47, lines 14 through 19 (Tr. Vol. 7, p. 1911.50) (advocating Commission adopt Synapse Alternative Plan);

(d) Pre-filed testimony Page 51, lines 13 through 15 (Tr. Vol. 7, p. 1911.54) (advocating Commission rely upon battery storage cost assumptions from Synapse Alternative Plan);

(e) Pre-filed testimony Page 53, lines 9 through 11 (Tr. Vol. 7, p. 1911.56) (advocating Commission rely upon Synapse Alternative Plan); and

(f) Pre-filed testimony Page 54, line 9 through page 55, line 6 (Tr. Vol. 7, pp. 1911.57 – 1911.58) (advocating the Commission require Duke to rely on Synapse Alternative Plan assumptions and to develop an alternative modeling scenario that relies upon Ms. Wilson's recommendations and assumptions presented in the Synapse Alternative Plan.

(g) Live testimony, Page 1909, line 18 through Page 1936, line 18; Page 1948, line 16.

(h) Exhibit KL-S-1 (Hearing Ex. 50) (Synapse Alternative Plan); and

(i) Exhibit KL-S-3 (Hearing Ex. 50) (proposed solar and storage addition recommendations developed using Synapse Alternative Plan).

(3) Surrebuttal Testimony of John D. Wilson, witness for the Environmental Parties;

(a) All pre-filed and live testimony (Tr. Vol. 7, pp. 2090 - 2142);

(b) Exhibit JDW-1 (Hearing Ex. 53) (Summary of Professional Experience);

(c) Exhibit JDW-2 (Hearing Ex. 53) (Report on Implementing All-Source Procurement in the Carolinas, dated February 26, 2021); and

(d) Exhibit JDW-3 (Hearing Ex. 53) (Report on Making the Most of the Power Plant Market: Best Practices for All-Source Electric Generation Procurement) (together with JDW-2, the "All-Source Procurement Reports").

(4) Surrebuttal Testimony of Tyler Fitch, witness for Vote Solar;

(a) Pre-filed testimony Page 10, lines 13 through 19 (Tr. Vol. 3, pp.742.10) (describing Synapse Alternative Plan report and advocating the Commission rely upon its modeling and conclusions).

(b) Live testimony, Vol 3, p. 770, lines 14-21; p. 773, line 25 through p. 775, line 2.

As further described below, the Commission should strike this testimony and exhibits because: *(i)* the Clean Energy Intervenors improperly exceeded the lawful scope of surrebuttal—which is limited to responding to "new matters" raised in the Companies' rebuttal testimony; *(ii)* the Synapse Alternative Plan and the testimony advocating the Commission rely upon its findings and conclusions violate the requirement of Act 62 that "reasonable discovery" be allowed for "alternatives to the plan raised by intervening parties," *see* S.C. Code Ann. §58-37-40(C)(1); and (*iii*) the "All Source Procurement Plan" and testimony relating to it ask this Commission to adopt new binding norms in this IRP proceeding in violation of the Administrative Procedures Act and in a manner that is inconsistent with the Siting Act. The Companies assert their belief that allowing this testimony and exhibits into evidence in this 2020 IRP proceeding would constitute clear grounds for appeal because fair and impartial procedures were not used and no opportunity for discovery was afforded as required under Act 62.

I. INTRODUCTION AND BACKGROUND

On April 15, 2021, over seven months after the Companies filed their 2020 integrated resource plans (the "2020 IRPs") with the Commission and just twelve calendar days before the start of the evidentiary hearing to review the Companies' IRPs under Act 62, the Clean Energy Intervenors submitted extensive surrebuttal testimony that raises novel issues, including a new alternative recommended resource plan that was not presented in their direct case on February 5,

2021. While these parties' surrebuttal testimony was filed in accordance with deadlines set by the scheduling order in these proceedings,[3] and 4 of their 6 witnesses properly filed testimony responsive to the Companies' rebuttal testimony, the Clean Energy Intervenors present two new witnesses that raised new issues based upon expansive new alternative resource plan analyses and other extensive new reports. This testimony and the underlying Synapse Alternative Plan and All-Source Procurement Reports are highly prejudicial because they violate the limited purpose of surrebuttal testimony and because there was no time left for the parties to engage in discovery on these alternative plan analyses or evaluate the reports and new recommendations in any meaningful way. DEC, DEP, and the Commission will be severely prejudiced if such testimony and new studies and reports are allowed to remain in the record of this proceeding. The tactics of the Clean Energy Intervenors also place the Commission in the untenable position of being asked to rely upon an unvetted and unreviewed alternative resource plan that has not been subject to discovery, analyzed in responsive testimony from DEC/DEP witnesses, or reviewed in any meaningful way by the Companies or the Office of Regulatory Staff ("ORS") in advance of the hearing.

The first "new issue" necessitating this Motion is the 30-page report co-authored and sponsored by Ms. Wilson of Synapse Energy Economics, Inc. entitled *Clean, Affordable, and Reliable: A Plan for Duke Energy's Future in the Carolinas* ("Synapse Alternative Plan"). The Synapse Alternative Plan filed as Exhibit RSW-2 is a corrected report dated March 19, 2021. Page 1 of the Synapse Alternative Plan states that "[t]he purpose of this report is to evaluate the 2020 [IRPs] filed in North Carolina" and focuses on the economic consequences to "North Carolina

[3] Pursuant to Order No. 2020-715-E, the Companies filed their direct testimony on November 13, 2020. Other parties, including CCEBA, the Environmental Parties, and Vote Solar, filed direct testimony 85 days later on February 5, 2021. The Companies then filed rebuttal testimony 47 days later on March 19, 2021 responding to testimony filed by the other parties. ORS and intervening parties then filed surrebuttal testimony on April 15, 2021.

ratepayers[.]"[4] The Synapse Alternative Plan, which is relied upon by several of the Advocacy Groups'[5] other witnesses, presents an extreme critique of the Companies' coal retirement study and recommends the Commission adopt an "alternative resource portfolio" based on significant modifications to certain of the Companies' planning and cost assumptions.[6] Neither Ms. Wilson's testimony nor the sponsoring Advocacy Group intervenors provide the Commission with any explanation why this significant alternative resource plan could not have been filed earlier. Because the Clean Energy Intervenors chose to file this report as part of their surrebuttal testimony and *not* in their direct case on February 5, 2021, the Companies had no opportunity to conduct discovery in this proceeding on any of the issues or recommendations made in the Synapse Alternative Plan, nor did they have the opportunity to pre-file responsive testimony highlighting significant deficiencies in Ms. Wilson's analysis.

CCEBA Witness Lucas and Vote Solar Witness Fitch also rely upon the improperly presented Synapse Alternative Plan in surrebuttal testimony to promote arguments they initially advocated for in their direct testimony.

The second "new issue" is the 55-page report entitled *Implementing All-Source Procurement in the Carolinas* and the 62-page report entitled *Making the Most of the Power Plant Market: Best Practices for All-Source Electric Generation Procurement* (together, the "All-Source Procurement Reports"), authored by and attached as Exhibit JDW-2 and JDW-3, respectively, to the surrebuttal testimony of Environmental Parties Witness J. Wilson. The All-Source Procurement Reports present for the first time an alternate approach to the Companies' established procurement process, which is completely unrelated to issues raised to date in these

[4] *See* R. Wilson Surrebuttal, Ex. RSW-2, at 1 (Hearing Ex. 56, p. 12).
[5] As explained in the Rebuttal Testimony of DEC/DEP Witness Glen Snider, the "Advocacy Groups" include Environmental Parties, CCEBA, and Vote Solar.
[6] R. Wilson Surrebuttal at 3-4 (Tr. Vol. 7, pp. 2151.5 – 2151.6)

proceedings and the Companies similarly had no reasonable opportunity to investigate through discovery or provide rebuttal testimony to these recommendations before the start of the hearing. In addition, by proposing that this Commission adopt new rules regarding generation procurement in this proceeding, the Environmental Parties ask this Commission to adopt binding norms that are procedurally in violation of the Administrative Procedures Act and substantively inconsistent with the Siting Act.

II. ARGUMENT

A. Surrebuttal Testimony That Raises New Issues and Which is Not Limited to Responding to Issues Raised in Rebuttal Testimony Must Be Stricken.

Surrebuttal testimony must be limited to replying to **new matters** raised in rebuttal testimony. *See State v. Watson*, 353 S.C. 620, 623-24, 579 S.E.2d 148, 150 (Ct. App. 2003) ("Surrebuttal is appropriate when, in the judge's discretion, new matter or new facts are injected for the first time in rebuttal"); *U.S. v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) ("Surrebuttal evidence is admissible to respond to any *new matter* brought up on rebuttal.") (emphasis added); *State v. Farrow*, 332 S.C. 190, 194 (S.C. App., 1998) ("We thus hold the reply testimony . . . was improper because it was not presented to rebut evidence adduced by Farrow.") (citing *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944)).

The policy reason underlying the long-standing requirement that surrebuttal testimony only be offered in response to new matter raised in rebuttal testimony is that it would be fundamentally unfair for a party to raise an issue for the first time in surrebuttal testimony without the party with the burden of proof, in this case the Companies, being given a corresponding opportunity to introduce responsive evidence. The lack of an opportunity to introduce responsive evidence to this new discussion in surrebuttal testimony violates the Companies' due process rights. *See Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008) ("The procedural component

of the state and federal due process clauses requires the individual whose property or liberty interests are affected . . . the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.").

Because the very filing of surrebuttal testimony "is discretionary with the Commission[,]" *see Palmetto Alliance, Inc. v. South Carolina Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695, 699 (1984); Order No. 2020-431 at 3-4, Docket No. 2019-281-S (July 6, 2020), and because utilities must be given a "meaningful opportunity" to respond to evidence presented by other parties, *Utils. Serv. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011), parties should be extremely circumspect in presenting surrebuttal—and the Commission should ensure the parties appropriately limit surrebuttal, if it is allowed at all—to "new matters" raised in rebuttal testimony. *See State v. Watson*, 353 S.C. 620, 623-24, 579 S.E.2d 148, 150 (Ct. App. 2003); *U.S. v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) ("Surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal."); *State v. Farrow*, 332 S.C. 190, 194 (S.C. App., 1998); *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944). Indeed, the Commission has recently declined to permit parties to file surrebuttal testimony, noting that "parties will have the full right to cross-examine all witnesses who are allowed to testify" at the hearing. Order No. 2020-431 at 3-4, Docket No. 2019-281-S (July 6, 2020).

For all of the foregoing reasons, it is clear that surrebuttal testimony is **solely** for the purpose of responding to new matters raised in rebuttal testimony, and that testimony and/or exhibits proffered in surrebuttal testimony that is not directly responsive to rebuttal testimony should be stricken. The testimony and exhibits that are the subject of this motion (see pp. 1-3 above) are responsive to the Companies' Integrated Resource Plans and supporting testimony

submitted in the Companies' applications and **direct** testimony and do not respond to new matters raised for the first time by the Companies in their rebuttal testimony. Accordingly, the testimony and exhibits must be stricken from the record.

i. ***The Synapse Alternative Plan, and all testimony that incorporates or relies upon it, should be stricken as improper surrebuttal testimony.***

The stated purpose of the Synapse Alternative Plan is to "present an alternative, optimized resource portfolio for the state [of North Carolina]."[7] In particular, the Synapse Alternative Plan advocates that the Companies should retire their coal-fired units at the earliest practicable retirement dates *without*, as the Companies propose, keeping any units online beyond 2035. This conclusion was purportedly reached through use of "state-of-the-art electric simulation software to compare the relative cost to ratepayers of continuing Duke's investments in existing and new fossil-fueled resources versus a scenario that replaces Duke's coal fleet with a portfolio of renewables, storage and energy efficiency[.]"[8] The Synapse Alternative Plan then presents "an alternative, optimized resource portfolio" based upon modified inputs and assumptions. It is thus axiomatic that the Synapse Alternative Plan should have been proffered earlier in the proceeding, as part of the Clean Energy Intervenors' case-in-chief—*i.e.*, in their direct testimony filed on February 5, 2021. *Daniel v. Tower Trucking Co.*, 32 S.E.2d 5, 10 (S.C., 1944) (a party may offer rebuttal testimony "provided it is in the nature of true reply and not such as should have been offered in the case in chief").

While Ms. Wilson claims that her surrebuttal testimony and Synapse Alternative Plan "respond" to the rebuttal testimony of DEC/DEP Witness Glen Snider, no part of her testimony directly engages with Mr. Snider's rebuttal testimony, only nominally referring to the substance

[7] R. Wilson Surrebuttal, Ex. RSW-2, at 1 (Hearing Ex. 56, p. 12).
[8] *Id.*

of his testimony. As an initial matter, this assertion is dubious at best as the Synapse Alternative Plan was completed *before* the Companies even filed their rebuttal testimony. Moreover, two of the three primary sections to her testimony—Section IV "Synapse Modeling Methodology" and Section V "Results of Synapse Modeling Analysis"—are clearly direct testimony and entirely devoted to discussing the Synapse Alternative Plan, its conclusions, and the recommendation for the Commission to require the Companies to adopt an "alternate resource portfolio" that was not introduced in either the Environmental Parties' or CCEBA's direct testimony.[9] The third primary section—"Critique of Duke's Coal Retirement Analysis"—attempts to highlight purported flaws in the Companies' methodology for economic analysis of coal retirements *presented in the Companies' initial IRP filing* and *not* on any novel argument or new explanation given in Mr. Snider's rebuttal testimony.[10] While each section contains one or more passing reference to Mr. Snider's rebuttal testimony—likely included as an attempt to preempt the issues raised in this motion—nowhere does Ms. Wilson identify what, if any, specific data or other information from Mr. Snider's rebuttal testimony was necessary to run the modeling that she and her colleagues performed and relied upon in the Synapse Alternative Plan.

It is inconceivable how Ms. Wilson's purported surrebuttal presenting the Synapse Alternative Plan could be fairly characterized as responsive to the Companies' rebuttal testimony. It is beyond dispute that the original Synapse Alternative Plan was completed in February 2021, followed by the "Corrected" version that is attached to Ms. Wilson's testimony dated March 19, 2021. The Clean Energy Intervenors either purposefully chose not to submit this Report as part of their direct testimony on February 5, 2021 or perhaps could not do so because the Synapse Alternative Plan was not yet complete. If the Clean Energy Intervenors wanted to use this analysis

[9] R. Wilson Surrebuttal, at 11-22 (Tr. Vol. 7, pp. 2151.13 – 2151.24).
[10] *Id.* at 6 (Tr. Vol. 7, p. 2151.8).

in the instant dockets, such analysis should have been conducted based on the procedural schedule set by this Commission months ago, as required by Act 62. The decision to delay filing the Synapse Alternative Plan in the instant proceeding, introducing such significant issues and conclusions for the first time in surrebuttal testimony, unfairly deprived the Companies of the opportunity to respond and prejudicially influences the decision-making of the Commission contrary to the express mandate of Act 62. And, for these reasons, the approach is plainly unlawful.

ii. The All-Source Procurement Reports, and all testimony that incorporates or relies upon it, should be stricken as improper surrebuttal testimony.

Like the Synapse Alternative Plan, the All-Source Procurement Reports and Mr. John Wilson's corresponding testimony improperly raises new issues in surrebuttal that do not directly respond to any new matters or issues presented in the Companies' rebuttal testimony. Instead, Mr. Wilson recommends that the Commission require the Companies to fundamentally reshape their resource planning and generation procurement functions and to adopt a new all-source procurement model to procure new capacity resources to meet the Companies' identified future capacity needs.[11] Mr. Wilson specifically recommends that the Companies adopt in these IRP proceedings an all-source procurement model used in other states—Colorado or New Mexico—an approach he describes as a utility's "unified resource acquisition process," which, he contends, will "ensure that a utility arrives at the optimal resource mix, reducing costs and risks to customers."[12] According to Mr. Wilson, all-source procurement requires a fundamental restructuring of the IRP, procurement, and certification regulatory processes to establish a single

[11] J. Wilson Surrebuttal, at 4 (Tr. Vol. 7, p. 2098.3).
[12] *Id.* at 4-5 (Tr. Vol. 7, pp. 2098.5 - 2098.6).

consolidated process to consider bids to meet the total system need identified in the Companies' IRPs at one time.[13]

While Mr. Wilson's surrebuttal testimony purports to respond to the rebuttal testimony of DEC/DEP witnesses Mr. Snider, Matt Kalemba, and Nick Wintermantel and suggests—without any meaningful explanation—that his new all-source procurement model recommendation could resolve numerous disputed issues between the Companies and intervenors,[14] at its core, the testimony is a completely new argument (and unprecedented attempt) to fundamentally reshape the generation procurement process in South Carolina and is only tangentially related to the Companies' as-filed IRPs and corresponding direct and/or rebuttal testimony. Tellingly, Mr. Wilson does not identify any specific information or data provided in the Companies' rebuttal testimony which prohibited the Environmental Parties from proposing that the Companies adopt an all-source procurement model in their direct case; and, indeed, he could not do so as the All-Source Procurement Reports are dated February 26, 2021 meaning that—like the Synapse Alternative Plan—they were completed *before* the Companies filed their rebuttal testimony.

Rather than ensuring Mr. Wilson's Reports were prepared in time to file with their direct case in this proceeding or seeking leave to file supplemental direct testimony and to amend the procedural schedule, the Environmental Parties instead have held on to the All-Source Procurement Reports and related recommendations for nearly two months before making these significant arguments in Mr. Wilson's surrebuttal testimony 12 days before the evidentiary hearing commenced.

[13] *Id.* at 10-11 (Tr. Vol. 7, pp. 2098.11 – 2098.12).
[14] S*ee id.* at 11-13 (Tr. Vol. 7, pp. 2098.12 – 2098.14).

Accordingly, consistent with settled South Carolina law that parties may not raise new issues on surrebuttal, the Company respectfully requests that the Commission strike Mr. Wilson's testimony in its entirety, including exhibits JDW-1, JDW-2 and JDW-3 (Hearing Ex. 53).

B. <u>The Synapse Alternative Plan and All Testimony Relying on It Should be Stricken from the Record Because it Was Submitted in Violation of the Requirements of Act 62.</u>

Environmental Parties and CCEBA's intentional tactic of improperly filing the Synapse Alternative Plan and related testimony only days before the hearing places the Companies and other parties at a significant disadvantage in preparing for and participating in the evidentiary hearing. This tactic also impedes the Commission in discharging its duty under Act 62 to vet these alternative planning recommendations and in making its determination as to whether the Companies' proposed IRPs "represent the most reasonable and prudent means of meeting the electrical utility's energy and capacity needs[.]" S.C. Code Ann. § 58-37-40(C)(1)-(2).

The well-established procedural prohibition on parties raising new issues in surrebuttal testimony is fully consistent with Act 62's mandate that the Commission must "*shall establish a procedural schedule to permit reasonable discovery* after an integrated resource plan is filed in order to to assist parties in obtaining evidence concerning the integrated resource plan, including the reasonableness and prudence of the plan *and alternatives to the plain raised by intervening parties*[.]" S.C. Code Ann. § 58-37-40(C)(1) (emphasis added). In other words, the General Assembly directed the Commission to establish a procedural schedule that would allow parties time for discovery and, importantly, would allow the Commission to meet its statutorily-prescribed obligation to issue an order on the Companies' 2020 IRPs no later than 300 days after filing. *Id.* There can be no credible argument that the Clean Energy Intervenors could not have timely filed this testimony and these reports as part of their direct case, as Commission Order No. 2020-715

established the procedural schedule and set the hearing date for these proceedings on October 21, 2020—over 105 days prior to the date these Advocacy Groups filed their direct cases. To file this significant new testimony and alternative planning recommendations based on unverified reports flies in the face of the clear mandate to establish as procedural schedule that would allow the Commission time to fully vet the IRPs and meeting its obligations under Act 62.

The Clean Energy Intervenors' tactic of filing this significant new testimony and exhibits in surrebuttal also violates Act 62's provision for "reasonable discovery" in IRP proceedings. The General Assembly in enacting the robust procedural requirements of the new Section 58-37-40 clearly viewed reasonable discovery as a necessary component of IRP proceedings to assist *all* parties and the Commission in evaluating utilities' IRPs *as well as* the alternative recommendations proposed by intervenors. *See* S.C. Code Ann. 58-37-40(C)(1). Where, as here, there were only 12 calendar days between the filing of surrebuttal testimony and commencement of the hearing, there was insufficient time for the Companies to conduct any meaningful discovery—much less "reasonable" discovery—on any newly raised issues, thus depriving the parties and the Commission the opportunity to fully vet the alternative recommendations proposed by intervenors in surrebuttal testimony as required under Act 62.

The harm of insufficient time for reasonable discovery relating to the Synapse Alternative Plan was demonstrated at the merits hearing during the cross-examination of Rachel Wilson. At the hearing, while reviewing a cross-examination exhibit provided to her by counsel for the Companies, Ms. Wilson learned for the first time that she had misunderstood the nuclear capacity available to DEC from the Catawba nuclear units. Tr. Vol. 7, pp. 2220-2224; Hearing Ex. 57. Ms. Wilson agreed that the Synapse Alterative Study assumed that DEC had 1700 MW of nuclear capacity that it did not have. Tr. Vol. 7; p. 2222, lines 12-21. In addition to the nuclear capacity

error identified at the hearing, Ms. Wilson testified that it takes a lot of time to do the type of analysis that she did and that getting it done for a regulatory proceeding is difficult because of tight schedules. Tr. Vol. 7, p. 2219. She also explained that her report had been filed and then re-filed with corrections in a North Carolina proceeding to review the Companies IRPs. Tr. Vol. 7, 2204-2205.

The testimony of Ms. Wilson on cross-examination demonstrates the wisdom of the General Assembly in requiring sufficient time for discovery and "vetting" of alternative resource plans. An example of the appropriate level of vetting of integrated resource plans as required by Act 62 was provided in the testimony and exhibits of ORS expert witnesses Hayet, Baron and Kollen. These three ORS experts from J. Kennedy and Associates, Inc. prepared 200-page reports on the IRPs of DEC and DEP. Hearing Exhibits, 24 and 25. The witnesses testified in detail about their analysis of the IRPs and were questioned by Commissioners about their opinions of the IRPs for a total of 59 pages of the transcript of this proceeding. Tr. Vol, 3, pp. 883-905; Tr. Vol. 4, pp. 930-954, 967-980. In contrast, the ORS witnesses first received a copy of the Synapse Alterative Plan on the day they filed their surrebuttal testimony. Tr. Vol. 7, pp. 2321-2322. They had no opportunity to conduct discovery on the Synapse Alternative Plan and offered no testimony on it and were not asked any questions by Commissioners on it. Tr. Vol. 7, p. 2322.

The Synapse Alternative Plan and all testimony relating to it should not be considered by the Commission in this proceeding and should be stricken from the record. Act 62 requires that alternative resource plans be subjected to scrutiny for their reasonableness and prudence. The Synapse Alternative Plan was filed in this proceeding too late to be subject to the appropriate level of scrutiny. One of the authors of the plan acknowledged that it was rushed and that it included serious mistakes. The ORS witnesses who reviewed the Companies' IRPs had no opportunity to

review the Synapse Alternative Plan and offered no testimony to assist the Commission in evaluating it. Under the circumstances the plan clearly violates the requirements of Act 62 and should not be considered.

C. The All-Source Procurement Plans and Testimony Relating to Them Should be Stricken from the Record Because the Reports and Testimony Ask this Commission to Improperly to Create New Rules Imposing Binding Norms in Violation of the Requirements of South Carolina Law.

It is now well established under South Carolina law that any agency seeking to establish rules of general applicability must comply with the rulemaking requirements of the Administrative Procedures Act ("APA"). S.C. Code Ann. §§1-23-10 *et seq*. This requirement was explained by the South Carolina Supreme Court in *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016):

> Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a "binding norm." *Home Health Serv., Inc. v. S.C. Tax Com'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). The "key inquiry" is
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> > the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.
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> *Sloan [v. South Carolina Board of Physical Therapy Examiners]*, 370 S.C. at 491, 636 S.E.2d 598 (Toal, C.J., dissenting) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

Joseph, 417 S.C. at 454, 790 S.E.2d at 772. The *Joseph* opinion explains that where an administrative agency attempts to create a binding norm without following the requirements of the APA its action "amounts to administrative overreach that attempts to end run the legislative process." *Joseph*, 417 S.C. at 455, 790 S.E.2d at 773.

There can be no doubt that the Environmental Parties are asking this Commission to commit administrative overreach by an end run around the legislative process with their proposals outlined in the All-Source Procurement Plans. The Environmental Parties called witness John Wilson, author of the All-Source Procurement Plans, to explain them. Wilson sponsored Exhibit JDW-2 (Hearing Ex. 53) entitled *Conducting an All-Source Procurement* which includes a discussion of "South Carolina laws and regulations." Ex. JDW-2, pp. 14-15. (Hearing Ex. 53, pp. 25-26). In the discussion of South Carolina laws and regulations Wilson acknowledges that South Carolina regulations on competitive procurement are "in transition" following the enactment of Act 62 and notes that the process to adopt CPRE regulations has been delayed and that the Commission has not yet moved forward to adopt rules as authorized under amendments to the Siting Act adopted in Act 62. JDW-2, p. 14 (Hearing Ex. 53, p. 25). Wilson's report states that "All-source procurement could proceed in South Carolina in a process that combines both Act 62 processes into a single process." JDW-2, p. 15 (Hearing Ex. 53, p. 26).

The "process" recommended by John Wilson and advocated by the Environmental Parties for adoption in these IRP proceedings would establish new rules that DEC and DEP would be required to follow for the procurement of any new generation resources. Tr. Vol. 7, p. 2096. It clearly creates new binding norms and under *Joseph* must be approved through the rulemaking process of the APA. Accordingly, the Commission should strike the All-Source Procurement Plans and related testimony from the record and should refuse to consider adoption of them in this proceeding.

III. CONCLUSION

The Synapse Alternative Resource Plan and related testimony and the All-Source Procurement Plans and related testimony should be stricken from the record. As discussed above, these exhibits and testimony are improper surrebuttal testimony not responsive to the Companies' rebuttal testimony and adoption of them in this proceeding would be in violation of Act 62 and the APA. For these reasons DEC and DEP request that the Commission grant this renewed motion to strike.

Respectfully submitted this 9th day of June, 2021.

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